IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, Plaintiff, v. JAMES SMITH, Defendant.	Case No. 16-mj-03054-KAR **DETENTION ORDER**

The defendant, James Smith ("the Defendant"), is charged by complaint with one count of offering to distribute material involving sexual exploitation of a minor in violation of 18 U.S.C. § 2251(d)(1)(A). In advance of the detention hearing, the Defendant waived his right to a preliminary hearing and conceded that there was probable cause to believe that he committed the offense charged in the complaint. *See* Fed. R. Crim. P. 5.1. The government has moved for detention on the ground that the Defendant is charged with a crime of violence, see 18 U.S.C. §§ 3142(f)(1)(A) and 3156(a)(4)(C), and has invoked the rebuttable presumption that arises when probable cause exists to believe that a defendant has committed a violation of 18 U.S.C. § 2252(a)(2). Following an evidentiary hearing and a review of the parties' submissions, the court concludes that the Defendant must be detained pending trial.

In determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, the court is directed to consider: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the person; (3) the history and characteristics of the person, including his character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning court appearances, and whether, at the time of the current arrest, the person was on release or under supervision for a different offense; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

When the government invokes a presumption of detention, the defendant bears a burden of producing evidence that he does not pose a danger to the community or a risk of flight. *See United States v. Mercedes*, 254 F.3d 433, 436 (2d Cir. 2001). "Even in a presumption case, the government retains the ultimate burden of persuasion by clear and convincing evidence that the defendant presents a danger to the community." *Id.* (citing *United States v. Rodriguez*, 950 F.2d 85, 88 (2d Cir. 1991)). "The government retains the ultimate burden of persuasion by the lesser standard of a preponderance of the evidence that the defendant presents a risk of flight." *Id.* (citing *United States v. Martir*, 782 F.2d 1141, 1146 (2d Cir. 1986)). The presumption favoring detention does not, however, disappear. Rather, it remains a factor to be considered, among other factors, by the district court. *See id.*

I find that the government has met its burden with regard to danger to others and the community. The Defendant is charged with offering to distribute material involving the sexual exploitation of a minor via the internet, which is deemed by statute to be a crime of violence. *See United States v. Whitty*, No. CR 06 30 B W., 2006 WL 980754, at *2 (D. Me. Apr. 10, 2006); *see also, e.g., United States v. Murphy*, Criminal No. 09-mj-067-01-JM, 2009 WL 1940023, at *1-2 (D.N.H. July 2, 2009). According to the evidence before the court, when the Defendant was arrested on January 8, 2015, his smart phone contained approximately seventy (70) images of child pornography, including pornographic images he had created of Minor A, a seven or eight year old female member of his household. Communications using an email address attributed to him showed an individual with few, if any, sexual boundaries with respect to minors. While the Defendant is employed and has the support of his family, it does not appear that his family fully appreciates the weight of the evidence against him, which is considerable. He has a substantial history of defaults, albeit in the fairly distant past, showing a tendency to disregard court orders. In any event, supervisory conditions cannot ensure that he has no access to the internet, where most crimes involving the sexual exploitation of minors are committed at this time, and "electronic monitoring may reveal where [the Defendant] is, but not who he is with." *Whitty*, 2006 WL 980754, at *2. In concluding that pretrial release of the Defendant, even subject to stringent conditions, would pose an unacceptable risk to identified minors and to the community, I take into account the statutory presumption of detention in cases such as this one, and the recommendation of Probation and Pretrial Services in favor of pretrial detention.

In the interest of completeness, the court also addresses the risk of flight and non-appearance. Notwithstanding the potential sentence the Defendant faces and his past history of defaults, the court is not persuaded that the government has shown by a preponderance of the evidence that the Defendant poses a risk of flight or non-appearance. He is living with his mother and other relatives, and could continue to do so. He and his family have limited financial resources to enable flight and he has never lived anywhere other than Hampshire County, where, it appears, most, if not all, of his family members live. With intensive supervision, which would be required in the event of release, I think it is unlikely that the Defendant would fail to appear in federal court when required to do so. Thus, the court's order for pre-trial detention in based on the danger posed by the Defendant to other individuals and the community.

Directions Regarding Detention

The defendant is committed to the custody of the Attorney General or a designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or held in custody pending appeal. The defendant must be afforded a reasonable opportunity to consult privately with defense counsel. On order of the United States Court or on request of an attorney for the Government, the person in charge of the corrections facility must deliver the defendant to the United States marshal for a court appearance.

Dated: 4/13/2016

BY THE COURT:

/s/ Katherine A. Robertson
KATHERINE A. ROBERTSON
UNITED STATES MAGISTRATE JUDGE